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Reapportionment: Is It Really a Political Question?

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COMMENTS

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> "To allow rotten boroughs to continue in open contravention of constitutional law is a direct contradiction of the principles of justice. We are not asked to open the floodgates of the courts to the political problems of the legislature. We are requested to enforce the clear command of the fundamental law which the legislators have sworn to obey."
>
> McLaughlin, J., Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 224 (D. Hawaii 1956).

These words were uttered in protest against the long established view of the courts of this country that the failure of a state legislature to reapportion legislative representation, how-

ever imperatively the duty to do so may be imposed upon such a body, does not present a grievance which may be redressed by the judiciary.[1] It is the purpose of this Comment to consider first whether or not legislative failure to reapportion in the face of an explicit constitutional mandate to do so presents a justiciable question, and if so, what remedies may be granted.

Constitutional Provisions For Reapportionment

The legislatures of thirty-nine of the states and territories of the United States are either directed or empowered by constitutional provisions to reapportion legislative representation.[2] Other states and territories handle the problem differently. In Maryland, the Governor alone is responsible for performance of the duty to reapportion,[3] and in Ohio[4] and Arkansas[5] the Governor and other executive officers are made responsible. In Florida, if the legislature fails to act, the Governor is directed to call the legislature into special session, where it must remain until

1. Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956); Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956); Remmey v. Smith, 102 F. Supp. 708 (1951); Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926); People *ex rel.* Mooney v. Hutchinson, 172 Ill. 486, 50 N.E. 599 (1898); People *ex rel.* Woodyatt v. Thompson, 155 Ill. 451, 40 N.E. 307 (1895); Denney v. State, 144 Ind. 503, 42 N.E. 929 (1896); Opinion of the Justices, 148 Me. 404 (1953); State *ex rel.* Morris v. Wrightson, 56 N.J.L. 126, 28 Atl. 56 (1893); Leonard v. Maxwell, 216 N.C. 89, 3 S.E.2d 319 (1939); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943); State *ex rel.* Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35 (1892).

2. *Required to act*: ALA. CONST. art. IX, § 199 (representatives), § 200 (senators); CALIF. CONST. art. IV, § 6 (both Houses); COLO. CONST. art. V, § 45 (both Houses); GA. CONST. art. III, § 3(2) (representatives); Hawaii Organic Act § 55 (48 U.S.C. § 562) (both Houses); ILL. CONST. art. IV, § 6 (both Houses); IOWA CONST. art. III, §§ 34, 36, (both Houses); KAN. CONST. art. X, § 2 (both Houses); KY. CONST. § 33 (both Houses); LA. CONST. art. III, §§ 2, 3 (both Houses); MAINE CONST. art. IV, §§ 1(2), 2(1) (both Houses); MICH. CONST. art. V, § 4 (both Houses); MONT. CONST. art. VI, § 3 (both Houses); N.H. CONST. (part 2) arts. 11, 26 (both Houses); N.J. CONST. art. IV, § 3 (both Houses); N.Y. CONST. art. III, §§ 4, 5 (both Houses); N.C. CONST. art. 2, §§ 4, 5 (both Houses); N.D. CONST. §§ 26, 29, 32, 35 (both Houses); OKLA. CONST. art. 5, § 10 (both Houses); PA. CONST. art. III, § 18 (both Houses); S.D. CONST. art. III, § 5 (both Houses); TENN. CONST. art. 2, §§ 4-6 (both Houses); TEX. CONST. art. 3, § 28 (both Houses); UTAH CONST. art. IX, § 2 (both Houses); VT. CONST. c. 11, § 18 (senators); VA. CONST. art. IV, § 43 (both Houses); WASH. CONST. art. 2, § 3 (both Houses); W. VA. CONST. art. VI, §§ 5, 7 (both Houses); WIS. CONST. art. IV, § 3 (both Houses).

Empowered to act: CONN. CONST. amend. II (senators); GA. CONST. art. III, § 2(3) (senators); IDAHO CONST. art. III, § 4 (both Houses); IND. CONST. art. IV, § 5 (both Houses); MINN. CONST. art. IV, § 2 (both Houses); MISS. CONST. art. 13, § 256 (both Houses); NEB. CONST. art. III, § 5 (both Houses); NEV. CONST. art. XV, § 174 (both Houses); ORE. CONST. art. IV, § 2 (both Houses); R.I. CONST. art. V, § 1 (representatives); S.C. CONST. art. III, §§ 3, 4 (representatives).

3. MD. CONST. art. III, § 5.

4. OHIO CONST. art. XI, § 11.

5. ARK. CONST. art. VII, §§ 3, 4, 5.

reapportionment is effected, and during which time it can consider no other business.[6] The Organic Act of Alaska adopts a system similar to that utilized by the Federal Government, by which the report of the Director of Census on the population of the various districts is made the basis of representation by operation of law.[7] In California,[8] Texas,[9] and South Dakota[10] reapportionment boards are directed to act in the event of failure on the part of the legislature to fulfill its duty in this regard.

Reapportionment Acts Subject To Judicial Review

It is firmly established that although some measure of discretion is given legislatures in reapportioning representation, the question of whether this discretion has been abused is subject to judicial review.[11]

If the ground for attack on legislative action is the abuse of a power entailing some exercise of discretion, such as a provision that the senatorial districts be equal in size,[12] courts refuse to interfere with an act unless there has been an abuse of discretion so flagrant as to constitute failure to obey the constitutional mandate.[13]

6. FLA. CONST. art. VII, § 3.

7. Alaska Organic Act, 37 STAT. 512 (1912). For a similar provision see MO. CONST. art. 3, § 2.

8. CALIF. CONST. art. IV, § 6.

9. TEX. CONST. art. 3, § 28.

10. S.D. CONST. art. III, § 5.

11. Ballentine v. Willey, 3 Hasb. 496, 31 Pac. 994 (Idaho 1893); People *ex rel.* Akin v. Adams County, 185 Ill. 288, 56 N.E. 1044 (1900); Murphey v. Ehey, 77 Md. 80, 25 Atl. 993 (1893); Stevens v. Secretary of State, 181 Mich. 199, 148 N.W. 7 (1914); Williams v. Secretary of State, 145 Mich. 447, 108 N.W. 749 (1906); Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892); Board of Supervisors of Houghton County v. Blacker, 92 Mich. 638, 52 N.W. 951 (1892); Rogers v. Morgan, 127 Neb. 456, 256 N.W. 1 (1934); State *ex rel.* Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916); Sherill v. O'Brien, 188 N.Y. 185, 81 N.E. 124 (1907); Baird v. Board of Supervisors Kings County, 138 N.Y. 95, 33 N.E. 827 (1893); People v. Canady, 73 N.C. 198 (1875); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943); Harmison v. Ballot Commissioners, 45 W.Va. 179, 31 S.E. 394 (1898).

12. For example, KY. CONST. § 33: "The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, . . . Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated . . . ." An apportionment statute violating this provision was considered in Ragland v. Anderson, 125 Ky. 141, 100 S.W. 865 (1907).

13. Opinion of Justices, 18 Me. 458 (1842); Attorney General v. Suffolk County Apportionment Comrs., 224 Mass. 598, 113 N.E. 581 (1916); Giddings v. Blacker, 93 Mich. 1, 52 N.W. 944 (1892); State *ex rel.* Harte v. Moorhead, 99 Neb. 527, 156 N.W. 1067 (1916); People *ex rel.* Carter v. Rice, 135 N.Y. 473, 31 N.E. 921 (1892); Brown v. Saunders, 159 Va. 28, 166 S.E. 105 (1932).

On the other hand, some provisions are not matters for the exercise of discretion by legislators, and their violation will result in a finding that the act is a nullity. In this category are provisions making it imperative that every county be given a representative,[14] or that the number of representatives or senators shall not exceed a fixed number,[15] or that the reapportionment of representation shall not take place more often than once every ten years.[16]

Legislative Failure To Reapportion Not Subject To Judicial Review

Although courts will consider positive action by the legislature in effecting reapportionment, they have steadfastly declined to consider the failure or refusal of legislatures to reapportion.[17] Two basic objections to considering such failure have been raised in almost every instance. The first is that suits which ask a court to consider legislative failure to reapportion involve questions of a "peculiarly political nature."[18] The second objection commonly raised is that to compel a legislature to reapportion, either directly or indirectly, would violate the theory of separation of powers of government.[19] Thus, no matter how clear or how imperative the duty may be,[20] redress cannot be had in the courts. Failure to comply with a constitutionally imposed duty merely passes the duty on to the next legislature,

14. For example, LA. CONST. art. III, § 2: "[R]epresentation in the House of Representatives shall be equal and uniform, and shall be based upon population. *Each parish and each ward of the city of New Orleans shall at least have one representative.*" (Emphasis added.) *Cf.* Sandoz v. Sanders, 125 La. 396, 51 So. 436 (1910), in which it was held that although the Legislature may create a new parish without submission of a proposition to the people, the parish cannot exist without representation in the General Assembly, and an act to create a new parish providing that a representation be assigned to it at a future time was unconstitutional.

15. For example, LA. CONST. art. III, § 2: "The number of representatives shall not be more than one hundred and one." *Cf.* Adams, President of Police Jury v. Forsythe, 44 La. Ann. 130, 10 So. 622 (1892), in which it was held that La. Acts 1890, No. 107, p. 138, which purported to create a new parish called "Troy," was illegal and unconstitutional, because it increased representation in the House of Representatives beyond the maximum number fixed in LA. CONST. art. 16 (1879).

16. Opinion of Justices, 18 Me. 458 (1842).

17. See note 1 *supra.*

18. Colegrove v. Green, 328 U.S. 549 (1946). See also State *ex rel.* Cromelien v. Boyd, 36 Neb. 181, 54 N.W. 252 (1893), and cases cited note 1 *supra.*

19. State *ex rel.* Sullivan v. Schnitger, 16 Wyo. 479, 95 Pac. 698 (1908). *Cf.* Fouracre v. White, 7 Boyce 25, 102 Atl. 186 (Del. 1917); State *ex rel.* Abel v. Gates, 190 Mo. 540, 89 S.W. 881 (1905); Person v. Doughton, 186 N.C. 723, 120 S.E. 481 (1923); State *ex rel.* Flanagan v. South Dakota Rural Credits Bd., 45 S.D. 619, 189 N.W. 704 (1922); cases cited note 1 *supra.*

20. Fergus v. Marks, 321 Ill. 510, 152 N.E. 557 (1926).

the obligation continuing until it is fulfilled.[21] The legislature is regarded as being responsible solely to the people for failure to perform its duty.[22]

Because these two objections are raised in almost every case involving the failure of a legislature to reapportion legislative representation, it becomes necessary to examine and analyze the nature of a political question and the doctrine of separation of powers.

The Nature of a Political Question

First, it is necessary to point out that a question is not political simply because the case presented may involve a political right. For example, the United States Supreme Court has not hesitated to hold that the right to vote includes the right to have the ballot counted.[23] Also, that right has been held to include the right to have the vote counted at full value, without dilution or discount.[24] In such cases the controversy may involve things political, but the question presented for decision by the court is not "political" in the sense that it is non-justiciable.[25]

Cases involving what have been considered to be political questions fall into two broad classes: inter-governmental, and intra-governmental. In the inter-governmental field are found cases involving relations between the United States and governments of foreign nations,[26] or between the government of the United States and those of individual states.[27] Intra-governmental political questions are those which concern the distribution of governmental powers and functions among the separate

21. Opinion of Justices, 148 Me. 404 (1953); Botti v. McGovern, 97 N.J.L. 353, 118 Atl. 107 (1922); Fergus v. Kinney, 333 Del. 437, 164 N.E. 665 (1928). People *ex rel.* Carter v. Rice, 135 N.Y. 473, 31 N.E. 921 (1892).

22. Opinion of Justices, 148 Me. 404 (1953) and authorities cited therein. See also cases cited note 21 *supra*.

23. United States v. Classic, 313 U.S. 299 (1941); *Ex parte* Yarbrough, 110 U.S. 651 (1884).

24. United States v. Saylor, 322 U.S. 385 (1944).

25. Justice Holmes in Lane v. Wilson, 307 U.S. 268 (1939), stated that to say the subject matter of such suits was political was a mere play upon words.

26. United States v. Sandoval, 167 U.S. 278 (1897); Smith v. United States, 137 U.S. 224 (1890); Jones v. United States, 137 U.S. 202 (1890); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851); Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415 (1839); De la Croix v. Chamberlain, 24 U.S. (12 Wheat.) 599 (1827).

27. Massachussetts v. Mellon, 262 U.S. 447 (1923); Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917); Ohio *ex rel.* Davis v. Hildebrandt, 241 U.S. 565 (1916); Kierman v. City of Portland, 223 U.S. 151 (1912); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867); Susman v. Board of Public Education of City of Pittsburgh, 228 Fed. 217 (W.D. Pa. 1915).

branches of government.[28] It will be noted in considering the jurisprudence that there are areas in which the two categories overlap.

In the inter-governmental field the idea of a political question stems from relations between sovereigns. In *Jones v. United States*,[29] it was contended that the United States did not have jurisdiction over a particular island in the Caribbean Sea and that as a result plaintiff in error could not be convicted in a court of the United States of a murder committed on that island. In rejecting this contention, the court stated that the determination of who is sovereign is a matter of policy to be decided by the legislative and executive departments. Such a decision having been made, the court was bound thereby.

In analyzing the *Jones* case, it may be observed that a court of the United States could not decide whether the United States or Haiti had jurisdiction over the island[30] because there was an absence of law upon which to base a decision. The two nations had submitted to no higher form of law in the light of which the court could have heard and determined the question. Any judgment rendered would have been no more than an expression of personal opinion, and would not have been binding upon the government of Haiti. The assertion of claims and conduct of foreign affairs by a sovereign power are matters of policy for that government to determine in its own right.

It will be noted that an intra-governmental element is also involved in this instance because within the government of the

28. Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Neely v. Henkel, 180 U.S. 109 (1901); Botiller v. Dominguez, 130 U.S. 238 (1889); The Legal Tender Case, Juillard v. Greenman, 110 U.S. 421 (1884); The Florida, 101 U.S. 37 (1879); Phillips v. Payne, 92 U.S. 130 (1875); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866); United States v. Rogers, 45 U.S. (4 How.) 567 (1846); Foster v. Neilson, 24 U.S. (2 Pet.) 253 (1829); United States *ex rel.* Holzendorf v. Hay, 20 App. D.C. 576 (1902). Some of the cases cited above are in a context of international relations; however, as will be explained, the problem in cases of this nature is two-fold: first, the problem of attempting to adjudicate on an international level, and, second, the matter of delegation of a particular function to another branch of the government.

29. 137 U.S. 202 (1890).

30. It has been authoritatively stated that where an adjudication of individual legal rights is underpinned by a political decision, a court, in the absence of any clear determination by a political branch of government, will attempt to forecast what the political decision should be. Pugh, *The Federal Declaratory Remedy: Justiciability and Related Problems*, 6 VAND. L. REV. 79 (1952). This, perhaps, is true. However, such cases do not deal with the determination of rights which stem directly from a question allegedly political. In this sort of case a court makes no attempt to exercise the assertive function which has been delegated to another branch of government, nor does it directly attempt to control the right of another sovereign government to formulate and execute its own policies.

United States itself the power to make discretionary decisions with regard to territorial claims is vested in the executive and legislative branches of the government,[31] and for the exercise of discretion in such matters the members of those branches of the government are responsible to the people through the sanction of the ballot.

The problem grows more complex when the controversy concerns the United States Government and that of a state. In *Luther v. Borden*[32] plaintiff sought damages in trespass for actions of the charter government of Rhode Island. Plaintiff's claim was founded on the contention that the charter government was not, at the time of the damage, the lawful government of the state. The United States Supreme Court refused to decide whether the charter government or the insurrectionary government was sovereign at the time the alleged trespass was committed. It is obvious that had Rhode Island been a foreign nation, a court of the United States could have rendered no binding decision. However, the problem is altered somewhat because in ratifying the Constitution the states of the union agreed to submit to the authority of a central power in certain limited fields. For this reason, it must be determined whether there is any limitation upon the states in organizing or overthrowing their governments. The answer is affirmative. Article IV, Section 4, of the Constitution[33] provides that the United States shall guarantee to every state of the Union a republican form of government. It is at this point that an intra-governmental issue arises. Is the enforcement of the guarantee a proper function of the courts? It has been held that the duty of enforcing this provision is imposed upon the legislative and executive branches, not upon the judiciary.[34] Thus, there is still an absence of law upon which a court could base a decision as to which of the two governments is sovereign. With regard to the State of Rhode Island, no judicial decision would be binding, and within the

31. U.S. CONST. art. II, § 2(2); art. II, § 3; art. IV, § 3(2); Art. I, § 8(18).
32. 48 U.S. (7 How.) 1 (1849).
33. U.S. CONST. art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature can not be convened) against domestic Violence."
34. Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937); Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 175 (1875); Texas v. White, 74 U.S. (7 Wall.) 700, 730 (1869). The above cases serve only as examples and are not exhaustive. Each of the above cases arose subsequent to *Luther v. Borden* and is cited in addition to the holding to the same effect in that case.

government of the United States itself, the only authority to settle such problems is given other branches of the government.

The issue grows more narrow when the problem is not simply which of two governments is sovereign, but is whether a particular form or act of government may be considered in a court of the United States. In *Pacific States Telephone & Telegraph Co. v. Oregon,*[35] an attempt was made to resist the collection of a tax which had been imposed by initiative. In attacking the statute the defendant telephone company made no complaint that it had had no opportunity to be heard, or that there was any violation of its rights inherent in the tax, but instead, it asked the court to determine whether the form of initiative is in fact "republican." In effect, the court was requested to demand that the State of Oregon defend the exercise of its sovereignty in adopting the legislative procedures of initiative and referendum.[36] Applying the principles previously noted, the same solution must be reached. If Oregon had been a foreign nation, a court of the United States could not have questioned the exercise of discretion by that nation in adopting a particular law. Since enforcement of the limitation in Article IV, Section 4, is not within the power of the judiciary, no justiciable issue was presented.

It is to be noted, however, that in a case such as the *Pacific States* decision the non-justiciable issue of whether the forms of initiative and referendum are republican in nature is in close juxtaposition with the justiciable issue of a denial of constitutionally guaranteed rights. As indicated in the decision of that case, the defendant made no complaint of any denial of its rights inherent in the tax.[37] Although the court could not question the sovereign will of the people of Oregon, it did have power to consider any denial of individual rights through abuse of the forms

35. 223 U.S. 118 (1912).

36. "It is the government, the political entity, which (reducing the case to its essence) is called to the bar of this court, not for the purpose of testing judicially some exercise of power assailed on the ground that its exertion had injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the State that it establish its right to exist as a State, republican in form." White, C.J., 223 U.S. 118, 150 (1912).

37. *Id.* at 150: "The defendant company does not contend here that it could not have been required to pay a license tax. It does not assert that it was denied an opportunity to be heard as to the amount for which it was taxed, or that there was anything inhering in the tax or involved intrinsically in the law which violated any of its constitutional rights. If such questions had been raised they would have been justiciable, and therefore would have required the calling into operation of judicial power."

of initiative and referendum. This result is achieved because in passing the Fourteenth Amendment[38] the Federal Government was given the power to protect against excesses in the administration by the states of their sovereign powers.[39] For example, no state is bound to grant criminals the right to trial by jury.[40] Nevertheless, if such right is granted, it must be administered without arbitrary discrimination resulting in a denial of equal protection of the law.[41]

In the field of inter-governmental relations, then, a pattern takes form. The basic element of a political question in this area is the absence of law under which one government, or a court thereof, may direct or restrain another government in the formulation and execution of its internal or external policies. If there is a system of law by which a government has delegated the performance of certain functions and the protection of specified rights to another government, that system must be examined to determine if the question at issue is one under the control of the central government. If the question is found to be within the ambit of the central power, a determination must be made as to which branch of that government is given the power to act. In this respect the problem becomes intra-governmental in nature, and it becomes necessary to consider more fully the doctrine of separation of powers.

Nature and Purpose of the Doctrine of Separation of Powers

The problem of enforcement of duties and restriction of powers of the several branches of government appears to have afflicted western civilization since the beginning of the struggle to achieve political liberty. Even in the Magna Carta an attempt was made to insure the enforcement of the concessions and obligations made and undertaken by King John.[42] In order that the barons might have some sanction for the violation of the Magna Carta, they were given the ultimate right to bear arms against the crown if satisfaction could not be obtained

38. U.S. CONST. Amend. XIV: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

39. *Ex parte* Virginia, 100 U.S. 339, 347 (1880).

40. Strauder v. West Virginia, 100 U.S. 303 (1879).

41. *Ibid.*

42. DICKINSON, THE GREAT CHARTER 13 (1955).

through a grievance committee.[43] In this effort to control monarchial power the embryo of the principle of separation of powers may be discerned.[44] The primary intent was to enforce the performance of duties and to restrict the exercise of arbitrary power. From this rudimentary method grew the English parliamentary system.[45] And it is from an analysis of that system by Montesquieu[46] that the elaborate scheme of checks and balances adopted in the United States Constitution was, in large measure, derived.[47]

Montesquieu was most strongly influenced by a desire to protect against arbitrary action.[48] It was his intention that no single branch should become supreme, but that all should interact to insure protection of the citizenry against excessive exercise of power.[49] Madison, in explaining the purpose of the doctrine, stated that Montesquieu did not mean that the three branches "ought to have no PARTIAL AGENCY or no CONTROL over, the acts of each other," but that the principles of a free constitu-

43. *Id.* at 28, Article 61 of the Charter. Plucknett, in his CONCISE HISTORY OF THE COMMON LAW 20 (1948) states that this provision was much too extreme. He further points out the fact that because of the fact that King John obtained a Papal bull annulling the Charter, it remained in effect for a total of scarcely more than nine weeks.

44. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW 210 (1931).

45. WADE & PHILLIPS, CONSTITUTIONAL LAW 5 (5th ed. 1955): "The importance of the . . .Magna Carta, 1215, and its numerous confirmations in later years lies not so much in the actual contents, since it preceded the era of representative government, as in the fact that it contained a statement of grievances the settlement of which was brought about by a union of important classes in the community. . . . The observance of the Charter came to be regarded both by lawyers and politicians as a synonym for constitutional government. It was the first attempt to express in legal terms some of the leading ideas of constitutional government."

46. I MONTESQUIEU, ESPRIT DES LOIS 149, bk. XI, c. 6 (rev. ed., Nugent transl. 1900).

47. ROSSITER, SEEDTIME OF THE REPUBLIC 359 (1953): "It would be hard to fix the precise responsibility of any one of these men [continental libertarians] for any one leading principle of colonial theory, except in the case of Montesquieu's doctrine of the separation of powers and Burlamaqui's emphasis on happiness as a right of man and an object of government."

48. 1 MONTESQUIEU, ESPRIT DES LOIS 150, bk. XI, c. 4 (rev. ed., Nugent transl. 1900): "Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power. But constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?"

"To prevent this abuse, it is necessary from the very nature of things that power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits."

49. *Id.* at 160: "These three powers should naturally form a state of repose or inaction. But as there is a necessity for movement in the course of human affairs, they are forced to move, but still in concert."

tion would be violated only where the whole power of one department is exercised by the same hands which possess the whole power of another department.[50] Thus, it was the general purpose of the doctrine as originally formulated, to bring about an effective method of preventing excesses of power by means of this system of interacting controls. The intent was "not to promote efficiency but to preclude the exercise of arbitrary power."[51]

The theory of separation of powers appears to have undergone three periods of development in the United States.[52] Originally, the doctrine was regarded as being rather flexible.[53] During the nineteenth century a more rigid attitude developed.[54] Finally, in recent years there has been a revival of the original, liberal view.[55] Such liberality has the feature of permitting each of the three branches to perform, in the interest of efficiency, functions which are not strictly in keeping with its name. Thus the delegation of rule-making powers to administrative agencies permits elements of the executive branch to perform legislative

50. THE FEDERALIST No. 47 (Hamilton).

51. Brandeis, J., dissenting in Myers v. United States, 272 U.S. 52, 293 (1926): "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

52. 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 203 (3d ed., Horack 1943).

53. *Id.* § 203. *Cf.* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829); Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803); Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800); Merrill v. Sherburne, 1 N.H. 199 (1818); Braddee v. Brownfield, 2 Watts & S. 271 (Pa. 1841).

54. Langenberg v. Decker, 131 Ind. 471, 478, 31 N.E. 190, 193 (1891): "The powers of these departments are not merely equal, they are exclusive, in respect to the duties assigned to each, and they are absolutely independent of each other." *Cf.* United States v. Queen, 105 Fed. 269 (E. D. Pa. 1900); People v. Mallary, 195 Ill. 582, 63 N.E. 508 (1902); People v. Chase, 165 Ill. 527, 46 N.E. 454 (1897); *In re* Davis, 58 Kan. 368, 49 Pac. 160 (1897); *In re* Ridgefield Park, 54 N.J.L. 288, 23 Atl. 674 (1892); People v. Waters, 4 Misc. 1, 23 N.Y. Supp. 691 (4th dept. 1893); Carter v. Commonwealth, 96 Va. 791, 32 S.E. 780 (1899). For a more complete citation to similar cases, see 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 204, n. 2 (3d ed., Horack 1943).

55. 1 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 205 (3d ed., Horack 1943). See also Parker v. Riley, 18 Cal.2d 83, 87, 113 P.2d 873, 877 (1941), in which the court stated: "The courts have long recognized that its [the doctrine of separation of powers] primary purpose is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. [citations omitted] The doctrine has never been interpreted as requiring the rigid classification of all the incidental activities of government, with the result that once a technique or method of procedure is associated with a particular branch of government, it can never be used thereafter by another." The court perhaps overstated its position when it asserted the principle to be "long recognized"; however, the passage clearly indicates a revival of the liberal view.

functions; the creation of administrative tribunals allows executive elements of the government to perform judicial functions; the increased use of the congressional investigative power with the avowed purpose of "exposure"[56] is a highly effective method by which the legislative branch exercises a judicial function through the power to convict persons in the court of public opinion. This intermingling of functions, however, is not inconsistent with the principle of separation of powers, for it is to be remembered that the important purpose of the doctrine is to protect against arbitrary exercise of power, and as long as this purpose is achieved, the delegation of powers in the interest of efficiency is not a dangerous occurrence.

Turning now to the role of the judiciary, it is to be noted that Montesquieu severely limited the power of the courts, regarding them as no more than the mouth which mechanically pronounces the law, performing no formative function.[57] However, it is perhaps impossible, and certainly undesirable, to have a judiciary which has no formative part in a legal system.[58] In America the judiciary has played an important formative role.[59] In performing its part, the judiciary has been given two fundamental instruments: the power of review[60] and the affirmative power of compelling the performance of non-discretionary, or ministerial, duties.[61] The more important power of the judiciary

56. Martin, *Separation of Powers*, 6 VA. L. WEEKLY DICTA COMP. 107 (1955): "The picture exhibited today does not display an invasion by the judiciary of legislative or executive powers. Rather, we see an increasing trend on the part of the Congress to augment its unquestioned investigative powers to the point of occasional impingement upon the appropriate function of the courts; and, more especially to vest in administrative commissions, boards and 'tribunals' powers that were once thought to be securely lodged in the constitutional courts of the United States."

57. 1 MONTESQUIEU, ESPRIT DES LOIS 159, bk. XI, c. 6 (rev. ed., Nugent transl. 1900): "But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."

58. APELDOORN, INLEIDING TOT DE STUDIE VAN NEDERLANDSE RECHT 234 (11th ed. 1952).

59. "In not one serious study of American political life will it be possible to omit the immense part played by the Supreme Court in the creation, not merely the modification, of the great policies, through and by means of which the country has moved into her present position. . . . The Judges of the Supreme Court of the land must be not only great jurists, they must be great constructive statesmen, and the truth of what I say is illustrated by every study of American statesmanship." From a speech by Theodore Roosevelt at a dinner of the Bar in honor of Judge Harlan in 1902, as quoted in 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 1 (rev. ed. 1937).

60. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 414 (1821); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); THE FEDERALIST No. 78 (Hamilton).

61. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

is that of review. However, the power of the courts to entertain cases is subject to limitations where the controversy at hand may be designated as political. It has been said that the matter of what is a political question may be regarded basically as a matter of delegation.[62] However, the writer feels that although delegation may well form a key to the true nature of an intra-governmental political question, it is possible to reduce the matter to an essence. One may begin by returning to *Luther v. Borden*[63] as an example. Within the framework of the United States Government, the judiciary was incompetent to decide the question presented because no question of law was involved, other than the guarantee in the Constitution of a republican form of government. However, enforcement of this provision was said to be delegated to another branch of the government. Similarly, the courts may not themselves make a decision within the discretion of another branch of government, such as the power to recognize a foreign government.[64] A further limitation is found in the fact that the courts may not compel performance of a discretionary function, such as the power of the State Department to determine whether it wishes to press the claim of a United States citizen against a foreign government.[65] Additionally, the courts are prohibited from enjoining the performance of a discretionary duty within the bounds of the Constitution, such as the duty of the President to insure the faithful execution of the laws.[66]

It is a simple matter to observe a common denominator in the above prohibitions in the fact that each of the functions is delegated to another branch of the government. However, it would be fruitless to accept the system of separation of powers as having validity and purpose in itself. Thus, it is proper and, in fact, necessary to press the analysis further in order to seek some essential characteristic beyond the mere fact of delegation which is common to all of these political questions. Initially, it may be discerned that each of the areas into which the courts are forbidden to enter is characterized by the discretionary or

62. Weston, *Political Questions*, 38 HARV. L. REV. 296 (1924).
63. 48 U.S. (7 How.) 1 (1849).
64. Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829). *Cf.* Oetjen v. Central Leather Co., 246 U.S. 297 (1918); Ricaud v. American Metal Co., 246 U.S. 304 (1918); United States v. Baker, 24 Fed. Cas. No. 14501, at 902 (C.C.N.Y. 1861).
65. United States *ex rel.* Holzendorf v. Hay, 20 App. D.C. 576 (1902), error dismissed, 194 U.S. 373 (1904).
66. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866).

policymaking nature of the function concerned. Further, in each instance the officers granted these discretionary powers are responsible in the final analysis to the sovereign, the people, through the sanction of the ballot. Ultimately, then, the effect of entrance by the judiciary into any of the above areas would be to deprive the people of the right to control the policymaking, or assertive functions of their government. In so doing, the judicial branch would be guilty of more than a transgression against the integrity of a co-equal branch, it would be violating the basic purpose of the doctrine of separation of powers by arbitrarily usurping the power of the sovereign, the people. Such action would, in essence, constitute a mild form of revolt.

In summary, it is to be noted that inter-governmental and intra-governmental political questions possess a common characteristic. It was observed that an inter-governmental political question arises when a court of one nation attempts to invade the right of another sovereign nation to formulate and execute its internal and external policies, in other words, to deprive that nation of its sovereign powers. Similarily, it was pointed out that an intra-governmental political question is presented when a court is required to usurp from the people their right of control.

It is now possible to turn to a consideration of the problem of reapportionment. Prior to entering into such a discussion it must be noted that the problem may be viewed from two aspects: first, the failure of the legislature to enact the required reapportionment statute; second, the evils wrought by continued enforcement of an old apportionment act. The first facet of the problem is one which for reasons both legal and practical[67] the

67. The question of the use of the writ of mandamus is thoroughly discussed by Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). In practice, courts have not hesitated to issue writs of mandamus to subsidiary legislative boards, agencies, and political subdivisions within a state. Interstate Commerce Commission v. United States, 224 U.S. 474 (1911); City of East St. Louis v. Amy, 120 U.S. 600 (1887); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866); Connett v. City of Jerseyville, 125 F.2d 121 (7th Cir. 1941); Huidekoper v. Hadley, 177 Fed. 1 (8th Cir. 1910); People v. Massieon, 279 Ill. 312 (1917); City of Cairo v. Campbell, 116 Ill. 305, 5 N.E. 114 (1886). However, the courts have consistently refused to issue a writ of mandamus to the legislative body, basing their refusal on the doctrine of separation of powers. This is a fundamentally correct view; however, it is interesting to ponder the question of what the court should do if, as is frequently found in state constitutional provisions, purely administrative tasks involving no exercise of discretion are delegated to the legislature. In order to bring the problem into focus, one may transfer the function of reapportionment to a subsidiary board, such as those in Ohio, Arkansas, Texas, California, and South Dakota. In those instances mandamus will lie to force the board to reapportion. This is particularly interesting since in the latter three states the legislature is given the primary responsibility for reapportionment. It

courts are unable to consider. The failure to reapportion, considered as a question for examination in itself, is not an act of the legislature. Thus, since the power of review is limited to a consideration of acts of the legislative and executive branches, it would appear that the legislative refusal to reapportion is not a proper vehicle by means of which a complainant might present his grievance. However, the problem is altered when the enforcement of an outdated act is brought into question, and it is from this aspect that the problem is to be surveyed, first as an inter-governmental and then as an intra-governmental question.

Failure To Reapportion as an Inter-Governmental Issue

Four times within the past six years federal courts have been asked to consider the issues arising from defiance by a state legislature of state constitutional provisions requiring periodic reapportionment. In the first case[68] the court dismissed the action as being premature on the ground that the state legislature was then in session. However, it was indicated that if the action had not been premature, a novel and as yet undecided question would have been presented under the Fourteenth Amendment.[69] In the second case, *Dyer v. Abe*,[70] the District Court for Hawaii ruled that it had jurisdiction to consider the question and that it could grant relief. The last two cases[71] have been dealt with since the *Dyer* ruling; in both instances the courts granted motions to dismiss, distinguishing the *Dyer* case by the fact that the nature of the federal territorial relationship permitted action by the Hawaiian court in that instance,[72]

would appear, then, that the duty is not truly a discretionary duty involving an exercise of the legislative or policymaking function and that the only mistake the people in states having no provisions for such boards have made is in placing a non-discretionary duty in the hands of the legislature. Nevertheless, it is perhaps proper to hold free from direct compulsion by the courts the other two branches of the government in cases of this nature, for the practical difficulty of enforcing the remedy of mandamus against the members of the legislature constitutes a prodigious obstacle to the achievement of the ends of justice.

68. Remmey v. Smith, 102 F. Supp. 708 (E.D. Pa. 1951).

69. *Id.* at 710: "But a suit based on the Third Civil Rights Act . . . as well as upon the Fourteenth Amendment, may present novel questions, not as yet decided."

70. 138 F. Supp. 220 (D.C. Hawaii 1956).

71. Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956); Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956).

72. In the *Dyer* decision, the court pointed out that the relationship between the federal government and a territory is the same as that between a state and its political subdivisions. Thus, since it is within the power of a state court to compel exercise of discretion by political subdivisions and agencies, Judge McLaughlin stated that even though there should be a broader basis for the decision rendered, it was within the power of the court to issue a writ of mandamus to the Legislature of Hawaii. 138 F. Supp. 220 (D.C. Hawaii 1956).

whereas the nature of state-federal relations is radically different. In the cases refusing to consider the issue, the courts relied most heavily upon three decisions of the United States Supreme Court: *Colegrove v. Green,*[73] *McDougall v. Green,*[74] and *South v. Peters.*[75] Because these decisions have been considered authoritative, a close analysis of them is vital to this discussion.

In *Colegrove v. Green,* petitioners sought to have the Court declare invalid a 1901 act controlling the apportionment of congressional districts. In the opinion of the Court denying that there was jurisdiction, two factors were relied on: first, that the election was imminent and consideration of the case would result in chaos;[76] second, that the question was of a "peculiarly political nature."[77] The first reason is not important to the present discussion. Regarding the second factor, the Court stated that the duty of apportioning congressional representation had been delegated entirely to Congress. It must be pointed out that this is a political question of an *intra-governmental* nature. In a suit involving a state constitutional provision requiring reapportionment there is no such issue involved.

Accepting, for purposes of argument, the view that delegation to Congress of the power to control apportionment of congressional districts made the controversy political, it must be pointed out that only seven justices[78] heard the case and that the opinion of the court was rendered by only three of those seven.[79] Three of the remaining four dissented,[80] contending that the court had jurisdiction and that there had been a denial of equal protection of the law. Justice Rutledge cast the tie-breaking vote in his opinion, in which he concurred in the result, stating that the court had jurisdiction to consider the question but should refuse to exercise it in view of the delicate nature of state-federal relations. Thus, it is felt that the *Colegrove* decision is not strong authority. If it is to be cited as authority for any position, it might be forcefully argued that the majority of the court felt that the question there presented was justiciable.

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73. 328 U.S. 549 (1946).
74. 335 U.S. 281 (1948).
75. 339 U.S. 276 (1950).
76. 328 U.S. 549, 553 (1946).
77. *Id.* at 552.
78. Justices Frankfurter, Reed, Burton, Rutledge, Black, Douglas, and Murphy. Justice Jackson took no part, and Chief Justice Stone died in mid-term.
79. Justices Frankfurter, Reed, and Burton.
80. Justices Black, Douglas, and Murphy.

The second of the three cases, *McDougall v. Green,* made it necessary for the court to consider an Illinois statute requiring candidates for a new political party to file petitions with 25,000 signatures, provided that in that number must be 200 signatures from each of at least 50 counties within the state. Contrary to the apparent interpretation subsequently placed upon the decision,[81] the court did not refuse to hear the case but considered it and found that it was allowable state policy to require that candidates for state-wide offices have state-wide support.[82] The Supreme Court dealt with the problem as it does any equal protection question, by seeking to discover whether the discrimination involved had some foundation in policy rather than being purely arbitrary and capricious.

The third decision relied on in the district court opinions, *South v. Peters,* upheld the right of Georgia to utilize a county unit system.[83] In its per curiam, the court, citing the *McDougall* and *Colegrove* decisions, stated that the federal courts consistently refuse to exercise equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions. This seems to conflict with the *McDougall* decision rather than follow it because in the latter case the court actually considered the controversy presented to it without mentioning the political question problem.

Nevertheless, accepting the ruling of the court in *South v. Peters,* there is a valid distinction to be drawn between that case and a suit seeking relief from a legislature's refusal to reapportion. In *South v. Peters* the complaint was against a policy determination by the State of Georgia in exercise of its right to adopt a system distributing its electoral strength.[84] However, where there is a state constitutional provision requiring the legis-

81. Radford v. Gary, 145 F. Supp. 541, 544 (W.D. Okla. 1956); Perry v. Folsom, 144 F. Supp. 874, 876 (N.D. Ala. 1956). Both the *Radford* and *Perry* decisions express the idea that the *McDougall* decision represents a refusal by the Supreme Court to exercise its jurisdiction.

82. 335 U.S. 281, 282 (1948).

83. The system consisted of dividing the state into county units, the person receiving a majority of the votes in each unit to earn the unit vote. It is much the same as the electoral system for presidential elections, with the exception that by means of reducing the unit votes given to populace areas, it is possible to create a great disparity in value between the voting power of those residing in rural and urban areas. For a full discussion of the unfortunate features of this system, see Justice Douglas' dissenting opinion, 339 U.S. 276, 277 (1950).

84. "Although this particular statute had been enacted in 1917, the county unit system had been basic in the Georgia electoral system since its first constitution in 1777." 339 U.S. 276, n. 1 (1950).

lature to reapportion at specified intervals, the people have already determined the policy to be followed. For this reason, there is no issue concerning the wisdom of that policy or the right of a state to adopt it.

Considering the three decisions together, there appears to be no pattern. The *Colegrove* decision is, at best, very weak authority for any position. Moreover, it was considered to present an *intra-governmental* political question for which a separate remedy existed. In the *McDougall* case the court examined the statute in question; yet in *South v. Peters* the court refused to exercise its jurisdiction. It is felt that in view of this apparently patternless web of jurisprudence, the question of reapportionment of state legislative representation is one yet open for resolution. It seems that the three decisions discussed above are not as authoritative as at least three of the recent district court decisions have considered them to be. Consequently, the question bears further examination in the light of the principles previously outlined in discussing inter-governmental political questions.

In analyzing the nature of a political question, it was determined that the first inquiry should be as to the existence of any possible law by which the actions of one government could be questioned by the judiciary of another. It is certain that the apportionment of representation of state legislatures is not a function which has been delegated to any branch of the federal government. It is, therefore, one of the powers reserved to the states, and it is not within the power of the federal judiciary to question the right of a state to exercise such powers. The only provision in the body of the United States Constitution which is relevant is the guarantee contained in Article IV, Section 4, of the Constitution, discussed above. However, as noted, that provision is not subject to enforcement by the federal judiciary.

Although there is no provision under which the federal judiciary is empowered to exercise direct control over the apportionment of a state legislative body, there is the possibility that the administration of an established state policy may result in the deprivation of constitutionally guaranteed rights. A policy of equality of representation adopted by the people of a state is one which the federal judiciary is not free to question. However, if in the administration of that policy an individual is denied rights

guaranteed by the United States Constitution, it seems that a justiciable federal question would be present. In this instance, it is not the right to adopt such a policy which is in question; it is the administration of that policy which presents the issue. As pointed out by the Supreme Court in the *Pacific States* decision,[85] it is beyond the power of the judiciary to question the right of a state to adopt the forms of initiative and referendum; however, the court considered itself competent to redress any denial of individual rights suffered by plaintiff through passage of the tax in question. In this instance, it is beyond the power of the court to question the right of a state to adopt a particular policy; but, if in the administration of that policy an individual or class is denied equal protection of the law, it is within the power of the courts to hear the complaint.

The situation under discussion is similar in many respects to *Strauder v. West Virginia*,[86] in which it was held that, although the right to trial by jury is not a constitutionally guaranteed right, it is not within the discretion of any state to resort to arbitrary discrimination in administration of the right once it has been granted. This is the very essence of the equal protection clause of the Fourteenth Amendment.[87] Prior to the adoption of that amendment, it was not possible for the federal judiciary to question the exercise by states of their reserved powers in the light of the Bill of Rights.[88] However, it was the purpose of that amendment to subject state action in exercise of sovereign powers to the scrutiny of the federal judiciary.[89] The right to equal protection of the law is intended to prevent any person or class from being singled out as a special subject for discriminating or favoring legislation.[90] If individuals are denied the equal protection of the law by the continued enforcement of a particular statute, it is usually held that a justiciable federal question is presented.

It is possible to assert, on the basis of the foregoing discussion, that there is no absence of law upon which a federal court may render a decision with regard to the question of reapportionment. It appears that although a federal court may not take issue

85. 223 U.S. 118 (1912).
86. 100 U.S. 303, 306 (1889).
87. McPherson v. Blacker, 146 U.S. 1 (1892).
88. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).
89. Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1872); State *ex rel.* Lawson v. Woodruff, 134 Fla. 437, 184 So. 81 (1938); Manufacturers Trust Co. v. Roanoke Water Works Co., 172 Va. 242, 1 S.E.2d 318 (1939).
90. McPherson v. Blacker, 146 U.S. 1 (1892).

with the right of a state to adopt its policy, it should be free to check abuses in the administration of that policy. It thus appears that there is a provision within the framework of the United States Constitution on which a judgment might be based. In addition to this fact, there is no intra-governmental issue hindering a federal court as in *Colegrove v. Green.*[91] It is felt that an attack made upon the enforcement of an outdated apportionment act presents a non-political, justiciable question under the Fourteenth Amendment.[92] Discrimination exists in such instances. The only remaining question for the court to consider is whether or not the discrimination is arbitrary. In the light of an established policy intended to insure equality of representation and equality of voting power, it appears that the discrimination which has formed the basis for those suits previously brought before federal courts might easily have been deemed arbitrary and unreasonable.[93]

Further problems arise when an examination is made of the possible remedies which a federal court might grant in a situation such as this. However, a discussion of these problems is reserved for a separate section dealing with remedies.

Failure to Reapportion as an Intra-Governmental Issue

Since state courts are bound by the provisions of the United

91. This fact was pointed out very ably in a dissenting opinion in Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956).

92. If a complainant should seek to invoke the equity jurisdiction of the federal district courts, the proper statutory vehicle is to be found in 42 U.S.C. § 1983 (1871), conferring a right of action for deprivation of civil rights, and the jurisdiction of federal courts to entertain such matters is conferred by 28 U.S.C. § 1343 (3) (1948). For a full discussion of the problem in this context, see Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 227 *et seq.* (D. Hawaii 1956).

93. For example, the disparities in voting power found in Alabama under the complaint in Perry v. Folsom, 144 F. Supp. 874 (N.D. Ala. 1956), were as follows:

1. One vote in Hale County is approximately equal to:
   4 1/2 votes in Etowah County
   4 1/2 votes in Tuscaloosa County
   7 3/4 votes in Mobile County.
2. One vote in Bullock County is approximately equal to:
   6 votes in Etowah County
   6 votes in Tuscaloosa County
   9 1/2 votes in Mobile County.
3. One vote in Perry County is approximately equal to:
   4 1/2 votes in Etowah County
   4 1/2 votes in Tuscaloosa County
   7 3/4 votes in Mobile County.

In Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 226, n. 14 (D. Hawaii 1956), the court took judicial notice of the fact that a vote in one area was worth 6.84 times the value of a vote in another. See also Colegrove v. Green, 328 U.S. 549 (1946); Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943).

States Constitution,[94] the same considerations which militate in favor of the conclusion that the problem here involved is cognizable in the federal courts would also lead to the conclusion that a state court has power to determine the constitutionality of an outdated apportionment act under the equal protection clause of the Fourteenth Amendment. In considering the possibility of state court action it is necessary to direct some attention to the objection that action by the judiciary would constitute a violation of the doctrine of separation of powers. It will be remembered that the remedy for refusal to reapportion has been held to be in the people, through exercise of their political rights.[95] However, this position does not seem to be well founded in logic. It is something more than paradoxical to state that the people have a remedy through their right of franchise when the persons aggrieved are denied effective exercise of such rights by a refusal to reapportion. If voters in one area are not given their proper number of representatives, they are denied the right to make their will effective. Thus, it seems clear that if the people of such an unfortunate area have no remedy in the courts, they have no remedy at all. It is true that in the normal intra-governmental political question there is a remedy existent in the power of the people to express their displeasure at an existing situation through the elective process. However, the provision here under discussion is one by which the people, in drawing up their constitution, have sought to retain what they felt to be adequate control over their legislative representatives. If small blocs or combinations are allowed to defy their will as expressed in the constitution and through the franchise, refusal by the judiciary to redress such a situation does not take on the color of preserving the integrity of the legislative body; it is, instead, allowing usurpation of power by a minority group. This, it may be noted, is precisely what the doctrine of separation of powers was intended to prevent. The mere fact that this particular usurpation of power is less obvious, though perhaps more insidious, than others, does not change the fact that the failure to fulfill the duty to reapportion is as much an abuse of power as if the legislature had passed the outdated act at its last session. If there is a proper vehicle by which a question of law may be presented to the courts, it is clear that the ultimate result of judicial action

94. U.S. CONST. art. VI, § 2; *Ex parte* Siebold, 100 U.S. 371, 392-94 (1879); Claflin v. Houseman, 93 U.S. 130 (1876).

95. See cases cited note 1 *supra*.

would not violate but accomplish the purpose of the doctrine of separation of powers by protecting the people from an arbitrary usurpation of their power of control.

Bearing in mind this very essential aspect of the particular question with which this discussion is concerned, it is possible to direct attention to the matter of remedies which may be employed to redress a grievance of this sort.

Possible Remedies

It is evident at the outset that no court could affirmatively remap the apportionment of legislative representation in accord with the constitutional provisions.[96] Moreover, it would be questionable, and certainly highly impractical, for a court to attempt to mandamus the legislature to act.[97] Thus, one is forced to cast about for other possible methods of redressing the complaint. Two possible courses suggest themselves: first, a court might simply declare the outdated statute to be unconstitutional and rely on the legislative branch to provide a new system of representation in due course; second, a court might declare the act invalid, and decree that until passage of a new reapportionment act all elections are to be held on an at-large basis. These possibilities will be discussed separately.

The first remedy suggested has recently been discussed by the Tennessee Supreme Court.[98] In pondering the possibility of such a remedy, the Tennessee court stated that if the act were held invalid the legislature would have no standing as a duly elected body. The lower court had dealt with this difficulty by applying the *de facto* doctrine. However, the Tennessee Supreme Court refused to apply the doctrine. In that case the statute had been attacked on the ground that it was invalid for the reason that when the legislature failed to reapportion after the decennial census, the statute became a nullity through lapse of time.

96. Even if it might be considered that a court could go so far as to mandamus the members of the Legislature to take action, it would not be able to remap affirmatively the state's apportionment district. See cases in note 67 *supra*. This fact is based on the principle that although a court might be able to compel action, it cannot take the action which is given into the hands of an agency of another branch of government. The same reasons apply in regard to issuance of any other decree. The judiciary is empowered only to protect the rights of the individual party concerned, and not to perform the act of apportionment itself.

97. See note 67 *supra*.

98. Kidd v. McCanless, 292 S.W.2d 40 (Tenn. 1956). See also Fesler v. Brayton, 145 Ind. 71, 44 N.E. 37 (1896); State *ex rel.* Winnie v. Stoddard, 25 Nev. 452 (1900); Sullivan v. Schnitger, 16 Wyo. 479, 95 Pac. 698 (1908).

Thus, if the last statute were considered invalid, all previous statutes were invalid for the same reason. According to the Tennessee court this would leave the state without either a legislature or the election machinery for obtaining one. The difficulty presented in that instance was mainly in the ground upon which the assertion of invalidity was made. If a complainant sought to have a statute declared invalid, it would be possible for a court to enjoin its further enforcement without the need of any retroactive effect. Nevertheless, the Tennessee decision clearly presents the practical difficulties involved in granting such a remedy. For this reason, it would seem wise to discard this possibility and to examine the second suggested remedy.

Contrary to the situation just discussed, there is some valid precedent for granting the second remedy. In *Smiley v. Holm*[99] the United States Supreme Court, after striking down a state statute apportioning congressional representation, declared that congressional elections in the State of Minnesota should be held on an at-large basis. The same remedy was granted by the Virginia Supreme Court in *Brown v. Saunders*[100] with regard to the election of congressional representatives. The decree of the court in that instance resulted in an at-large election of the Virginia congressional delegation for the first time in 144 years.[101] In reaching its decision, the Virginia tribunal stated that there was a conflict between the statute apportioning representation and a provision of the Virginia Constitution requiring equality of representation. Without hesitation, the court stated that it was bound to obey the fundamental law of the state and to consider the principle of equality as more important than the provisions of the state constitution providing for election by representative districts. As pointed out by Justice Black in his dissent in the *Colegrove* case, in spite of the local inconvenience which might result from a decree of this nature "it has an element of virtue that the more convenient method does not have — namely, it does not discriminate against some groups in favor of others. . . ."[102]

Two principal objections to granting this remedy might be made: first, that such a means of granting redress would in-

99. 285 U.S. 355 (1932).

100. 159 Va. 28, 166 S.E. 105 (1932). *Contra*, Burns v. Flynn, 281 N.Y. Supp. 494, 155 Misc. 742 (3d dept. 1935), aff'd, 281 N.Y. Supp. 497, 245 App. Div. 799 (3d dept. 1935), aff'd, 268 N.Y. 601, 198 N.E. 424 (1935).

101. 159 Va. 28, 30, 166 S.E. 105, 109 (1932).

102. 328 U.S. 549, 552 (1946).

directly force the legislature to reapportion; second, that in providing for elections on an at-large basis, the court would be violating the doctrine of separation of powers by effecting its own brand of reapportionment. As to the first objection it may be pointed out that this is presumably the effect of any judicial decision which strikes down a reapportionment act, whatever may be the ground for so doing. Further, it must be remembered that the Virginia court in *Brown v. Saunders* granted the same remedy, and that the Supreme Court of the United States has done likewise. In considering the evils wrought by a continued enforcement of an outdated act, a court would be exercising its proper powers of review, and would not be usurping but protecting the power of the people to control their elected representatives. In answer to the second objection, it can only be said that those two courts which have granted the remedy have not been deterred from their course by this possible objection. However, in addition to the simple fact that other courts have granted this remedy, it may be said that if a court cannot prevent arbitrary usurpation of power by another branch, the purpose of the doctrine of separation of powers is being disserved. Moreover, if members of the legislative branch can invoke the doctrine in order to continue such usurpation, the purpose of the doctrine is prostituted. When the choice is between the touchstone of democracy, the adequate expression of the public will, and directory provisions setting standards to guide the legislature in effecting reapportionment, the course of action should be obvious.

Thus, it appears that the most satisfactory result which could be achieved would be a decree enjoining further enforcement of the outmoded apportionment act for the reason that it denies equal protection of the law, and providing that all future elections, until otherwise provided by the legislature, be held on an at-large basis. Such a decree protects the right of equality of representation, and in preserving the right of the people to control their elected representatives, it upholds the basic principle of the doctrine of separation of powers — the protection of the people from arbitrary usurpation of power.

Policy Considerations

It may be helpful in understanding the past attitude of the courts to point out some of the policy considerations which may have motivated judicial reluctance to deal with the problem of

reapportionment. Although it has been consistently argued in this Comment that the problem presented is not political in a legal sense, it is obviously political in that the extremely intense factionalism of state politics might result in a series of reprisals by one branch against another if the courts entertained the question. If, for instance, a court attempted to mandamus the legislature to act, it would possibly find itself in the position of Chief Justice Marshall after his decision in *Worcester v. Georgia*,[103] when it is said that President Jackson remarked, "Well, John Marshall has made his decision, now let him enforce it."[104] The basic difficulty in such a situation is that the judiciary is not equipped with armed forces by which it may secure compliance with its decrees.

Another factor, closely related to the first consideration is that the courts are not insensitive to the delicacy of problems of this nature, and in order to shift the onus to other shoulders a tribunal will frequently declare a question to be political which, in essence, is only controversial.[105]

A third consideration is that even though a state constitution may provide for representation on a numerical basis, apportionment in accord with such a policy does not always insure comprehensive representation. It becomes increasingly clear with the economic and social development of this country that democracy does not always exist where representation is purely a matter of numerical strength, for group representation is quite as important as the sheer power of numbers. Thus, adequate representation of a minority agricultural group is salutary in a predominantly industrial state, for it protects that group interest from being completely exploited by an industrial majority insensitive to rural problems. This consideration, however, is ostensibly cared for by means of election of the upper house of a state legislature on a territorial basis. In this manner, a minority group interest would retain reasonable power in one house while it should yield to the force of numbers in the lower house. Nevertheless, the adequate representation of minority groups in legis-

103. 31 U.S. (6 Pet.) 515 (1832).

104. 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 759 (rev. ed. 1937).

105. Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338, 363 (1924): "No matter in what terms the opinions of jurists have been couched, it is apparent that it is the fear of consequences or the lack of adequate data that has impelled the courts to refrain from entering upon the discussion of the merits of prickly issues."

lative bodies appears to be a strong factor in the refusal of the courts to entertain reapportionment controversies.

Each of these considerations has perhaps played its role in forming the past jurisprudence. The difficulty is that the fundamental law provides for one thing and these policy considerations tend toward another. Their employment in the past may fully explain the judicial attitude, but it does not justify their continued supremacy over contrary constitutional provisions.

Conclusions

It is felt that as a matter of theory, the problems bound up in a case attacking the validity of an outmoded apportionment statute are not political either on the inter-governmental or intra-governmental level. Regarding the federal jurisprudence, the writer is firmly convinced that none of the cases on which some recent district court decisions have relied is authoritative. Further, there is no problem of an intra-governmental nature hindering a federal court in this instance, as in *Colegrove v. Green.* It is also reasonable to assert that the situation brought about jointly by the refusal of the legislature to act and the continued enforcement of an out-dated statute is, in view of the pre-established policy set out in state constitutional provisions, a denial of equal protection of the law.[106] The objections which might be asserted to the rendering of a decree as suggested are, it is felt, more than met when it is considered that in taking action a court would be protecting the people against the exact same type of usurpation of power of which it would be guilty were it to decide a true political question. Eminent among all conclusions which may be drawn is the observation that the provision in question is the foundation of democratic government and that it is contradictory in the highest degree to say that the remedy for denial of the right to equality of voting power and representation is the right to assert, without hope of redress, a grossly diluted franchise in election of a number of representatives inadequate to effect the will of the people.

It is the writer's understanding of the democratic process that if the law is incorrect, it should be changed, but until that

106. It is to be noted that in two Oklahoma cases, Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956) and Jones v. Freeman, 193 Okla. 554, 146 P.2d 564 (1943), it was freely admitted that the legislature was in breach of its duty and was guilty of infringement upon the rights of the people to have equality of representation. In the *Radford* case, the Attorney General of Oklahoma openly admitted that there was a denial of equal protection of the law.

time it should be obeyed. If this be correct, there is no logical, moral, or legal reason why members of the legislature should, any more than any other official or citizen of a state be allowed to usurp from the people the rights of control which they have seen fit to reserve to themselves in their constitution.[107] It may well be that it is desirable to protect the representation of certain districts by providing for minimum representation in the constitution of a state. This has been done.[108] Such is the right of a state to decree its policy. But at the same time, that right is one belonging to the people as a sovereign and not to a minority of representatives espousing the cause of self or group interest.

George W. Hardy III

The Party Wall Servitude in Louisiana

In urban areas, the owners of adjoining properties often contract to build one wall on the line between their properties to support the buildings of both. This is done primarily to conserve land area, construction materials, and labor. In France, not only may a party wall be created conventionally, but an owner of property which adjoins a wall has a right, a legal servitude, to purchase an interest in the wall and make it one in common.[1] This right is granted by Louisiana law also; but, additionally, Louisiana law permits the person who first builds to rest one-half his wall on the land of his neighbor.[2] This Comment will be

107. See Dyer v. Kazuhisa Abe, 138 F. Supp. 220, 236 (D. Hawaii 1956); Radford v. Gary, 145 F. Supp. 541 (W.D. Okla. 1956) (dissenting opinion).

108. For example, see MISS. CONST. art. 13, § 256.

1. FRENCH CIVIL CODE art. 661: "Every owner adjoining a wall has also the right to make it a party wall, wholly or in part, by reimbursing to the owner of the wall half its value or half the value of the part over which he wishes to have a joint right and half the value of the land on which the wall is built." Compare with LA. CIVIL CODE art. 684 (1870): "Every proprietor adjoining a wall has, in like manner, the right of making it a wall in common, in whole or in part, by reimbursing to the owner of the wall one-half of its value, or the half of the part which he wishes to hold in common, and one-half of the value of the soil upon which the wall is built, if the person who has built the wall has laid the foundation entirely upon his own estate."

2. LA. CIVIL CODE art. 675 (1870): "He who first builds in the cities and towns, or their suburbs, of this State, in a place which is not surrounded by walls, may rest one-half of his wall on the land of his neighbor, provided he builds with stones or bricks at least as high as the first story, and not in frame or otherwise; and provided the whole thickness of this wall do not exceed eighteen inches, not including the plastering, which must not be more than three inches.

"But he can not compel his neigbor to contribute to the raising of this wall." *Cf.* Zellar v. LaNasa Bakery, 172 So. 33 (La. App. 1937) (zoning ordinances).